United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

74-1094

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P/S

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA
ex rel. CORNELIUS LUCAS,

Petitioner-Appellant,

-against-

PAUL J. REGAN, Chairman,
New York State Division
of Parole,

Respondent-Appellee.

Docket No. 74-1094

BRIEF FOR PETITIONER-APPELLANT

ON APPEAL FROM AN ORDER OF
THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YOR

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THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

QUESTIONS PRESENTED

1. Whether the Trial Court's refusal to grant a continuance deprived appellant of his Sixth and Fourteenth Amendment rights.

2. Whether the station house show-up of appellant was so conducive to mistaken identification as to violate due process.

3. Whether the failure of either the Court or the prosecutor to correct Adderly's false testimony deprived appellant of due process.

STATEMENT PURSUANT TO RULE 28(3)

Preliminary Statement

This appeal is from an order of the United States District Court for the Eastern District of New York (The Honorable Marc A. Costantino) entered on November 9, 1973, denying without a hearing a petition for writ of habeas corpus. The District Court granted a certificate of probable cause and leave to appeal in forma pauperis.

This Court continued The Legal Aid Society, Federal Defender Services Unit, as counsel on appeal pursuant to the Criminal Justice Act.

Statement of Facts

A. Prior Proceedings

Appellant was convicted, after a jury trial, in the Supreme Court of the State of New York, Kings County, of robbery in the first degree, grand larceny in the first degree, and assault in the first degree. On September 6, 1968, appellant was sentenced to concurrent sentences of ten to twenty years for the robbery count, five to ten years for the grand larceny count, and two to two-and-a-half years for the assault count.

On October 15, 1968, after a hearing, the Supreme

Court of the State of New York, Kings County, denied without opinion appellant's petition for writ of error coram nobis challenging the validity of the conviction.

The Appellate Division, Second Judicial Department, consolidated appeals from the judgment and the order, and affirmed both without opinion. People v. Lucas, 33 A.D.2d 994 (1970). The New York Court of Appeals affirmed the decision without opinion, The Honorable Charles D. Breitel dissenting. People v. Lucas, 28 N.Y.2d 761 (1971).* A motion to amend the remittitur was granted to reflect consideration of the constitutional issues. People v. Lucas, 29 N.Y.2d 549 (1971).

The Supreme Court of the United States denied certiorari, Mr. Justice Douglas dissenting. Lucas v. New York, 404 U.S. 994 (1971).

The issues raised on this appeal were considered by the New York courts and raised in the petition for writ of habeas corpus filed in the District Court.

B. The Underlying Crime

The evidence against appellant came primarily from Mrs. Carl Gardner, the victim of the robbery, and Norman Adderly, an accomplice. Through them, the State established

*The dissenting opinion of Judge Breitel is "C" to appellant's separate appendix.

that a robbery was committed by three armed men against Mr. and Mrs. Gardner in their home at 9:30 p.m. on April 23, 1964; that all three robbers carried guns; that two of the men tied Mrs. Gardner up; and that one robber threatened to kill her. In a station house line-up and at trial, Mrs. Gardner unequivocally identified Norman Adderly and Edward Polhill as two of the robbers. Mr. Gardner identified only Polhill. The prosecution contended that appellant was the third man involved.

Mrs. Gardner testified that at about 9:30 p.m. on April 23, 1964 (T 346-47*), Adderly, carrying a gun, forced his way into the apartment and put one hand around her neck and the other over her mouth (T 283, 301-02, 333-35, 337-38, 344). In this position Adderly pushed her back into the apartment toward a bedroom (T 302-03). Two other men entered the apartment behind Adderly, each with a drawn gun (T 277, 281, 302, 333-34, 337). Adderly placed his gun to Mrs. Gardner's head and threatened to kill her if she didn't tell where the "hit money" was hidden (T 278).** Using a sheet torn into strips by co-defendant Polhill, Adderly placed a gag in Mrs. Gardner's mouth and threatened to kill her if she screamed, and then Adderly tied her to the bed (T 284-86, 303). She

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*References denoted "T" are to minutes of the pre-trial hearing of May 19, 1965, and the trial of May 20, 1965.

**Mrs. Gardner admitted that she played the "numbers" and had hidden the "hit money" she had won under the pillow in the bedroom.

tried to look into the rest of the apartment while Adderly had his knee in her back as she lay face down on the bed (T 286, 364-65). Adderly took money from her wallet. He then took the gag out of her mouth and again threatened to kill her if she did not tell him where the rest of the money was, whereupon she told him it was hidden under the pillow (T 290-91, 287). Adderly directed the others to leave the apartment, and they left Mrs. Gardner tied face down on the bed (T 290-91). She did not know how long they had been in the apartment because she was so "scared," ahd she had a difficult time untying herself and helping her injured husband out of the bathroom because she was still frightened (T 293-94).

She testified that the third person did not touch her during the entire commission of the crime, and his only activity was searching around "all over" the other rooms of the aparmtnet (T 286, 288-89, 341-42, 348). She could not describe what any of the men were wearing or what they looked like, although she could remember their "faces," because she was so frigntened by their faces during the commission of the crime (T 307-08).

Mr. Gardner was in the bathroom during the entire time the crime was in progress. He observed Polhill, who injured Gardner in the bathroom, and both at the station house and at trial identified Polhill as one of the participants in the robbery (T 238-39, 248-49, 251). Never having seen the third robber, Mr. Gardner was unable to make any identification

as to who he was (T 234-36).

C. The Identification Procedures

The testimony given at trial by Mrs. Gardner and Detective Arthur Broughton revealed the following facts concerning the identification of appellant:

Two days after the robbery, at about 9:30 p.m., on Saturday, April 25, 1964, Detective Arthur Broughton arrested Adderly, Polhill, and Ulysses Bryant* while they were in a car. The gun Polhill used in the robbery was found in the car** (T 144-45, 379-80, 387-88).

On Sunday morning, April 26, three days after the commission of the crime, Mrs. Gardner was invited to the station house to see whether she could identify the men who had been arrested (T 309-10, 314).

A Detective Ott took her into a room from she could look through a peephole into an adjoining room. In the second room were six men dressed in civilian clothes. Mrs. Gardner identified Adderly, Polhill, and Adderly's cousin, Ulysses Bryant, as the three men who had robbed her apartment (T 311-12, 318-25). She remained at the precinct house the rest of the day (T 315, 317).

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*Adderly testified at the proceedings at which his plea was taken that Bryant was his cousin (T 66). The jury never heard this.

**The gun was introduced into evidence at the trial.

Later that day Ulysses Bryant was brought alone into a room at the station house. Upon questioning by Assistant District Attorney Cabaretta, Mrs. Gardner stated she could not tell whether he was one of the men unless he had a hat on. He was brought back wearing a hat, and she confirmed her identification of Bryant as one of the robbers:

> Yes; he was the one with the hat on.... That's one of the men that came into my house and held me up.... He ran around. He was doing the searching. He was tearing up the house. He was looking to see if I had money in the house.
>
> (T 320-21).*

In similar show-ups Mrs. Gardner again identified Polhill and Adderly.

Late Sunday afternoon, April 26, 1964, more than ninety minutes after Mrs. Gardner's second identification of Ulysses Bryant, Detective Broughton went to appellant's home without a warrant with the intention of arresting appellant as the third participant in the Gardner robbery (T 381, 389). He gained entrance to the Lucas residence by telling appellant's wife that he was investigating a hit and run accident (T 392). He took appellant back to the 79th Precinct about forty-five minutes after the arrest and questioned him

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*While in the station house Mrs. Gardner identified Bryant as the third robber because he was wearing a hat. Contrary to her testimony, Mr. Gardner and Detective Broughton both testified that only Polhill had been wearing a hat (T 238-39, 248-49, 251, 393). The transcript of Mrs. Gardner's station house identification of Bryant is fully set forth at Appendix E.

there (T 381, 390). Appellant denied participation in the robbery (T 393).

At approximately 5:50 p.m. (T 369) Mrs. Gardner was brought back into the room with Assistant District Attorney Carabetta. Appellant was brought into the room alone.* Carabetta asked Mrs. Gardner, "Do you recognize that man?" Mrs. Gardner withdrew her identification of Bryant and identified appellant as the third person involved in the robbery, the man who had been searching through the house for money (T 358-59).

At trial, more than a year later, Mrs. Gardner identified all three men (T 279-80).

It was not until she revealed, on cross-examination on the second day of trial, her prior identification of Bryant that defense counsel learned of it. It was also at this time that he received the transcript of Mrs. Gardner's station house identification of Bryant for purposes of cross-examination. Thus, the prosecution had kept Mrs. Gardner's previous identification of Bryant secret for more than a year prior to trial (T 519).

Further, although at trial Mrs. Gardner claimed that she had told Carabetta that she was not sure the third man was

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*Appellant wore a beard and was thirty-nine years old. See indictment endorsements. Ulysses Bryant, on the other hand, was clean shaven and was twenty-five years old (T 521-22; see endorsements to complaint, People v. Bryant and Edwards, Criminal Court, Kings County, Docket Nos. A3741 and A3742/1964).

Bryant, the Assistant District Attorney conceded that the stenographic record of her identification in the station house did not contain any doubt as to her positive identification of Bryant (T 322, 328). Mrs. Gardner was asked at trial whether Bryant was present in the courtroom. She stated, "Yes, he is in here," and identified Polhill as Bryant. Then she said Bryant was not present (T 325-26).

At the conclusion of her testimony on May 21, 1965, the Court, at the request of counsel, indicated that Mrs. Gardner should be kept on call in the event she should be recalled by the defense (T 370). Near the close of the defense case, on May 25, 1965, after the weekend recess and two more days of testimony, counsel moved to recall Mrs. Gardner to the stand for further cross-examination on the show-up identification of appellant. Counsel pointed out that he had not been aware of Mrs. Gardner's original identification of Ulysses Bryant or any other man as the third robber until she was under cross-examination on the second day of trial. The Court denied the motion on the ground Mrs. Gardner had already testified (T 518-19).

Counsel also moved that the District Attorney be required to produce Ulysses Bryant in court, or produce his address, in order that the defense could examine him on the identification issue. These motions were denied (T 515-19, 522).

Counsel then moved for a continuance in order to

attempt to locate Bryant.* The motion was denied (T 522).

D. The Undisclosed Conditions for the Testimony of the Accomplice-Witness

On May 19, 1965, the day before the selection of the jury for the trial in this case, the Court conducted a hearing in the presence of appellant and his attorney to determine whether Adderly's case would be severed so he could testify for the prosecution at trial. During this hearing Adderly gave extensive testimony implicating appellant as the third robber (T 171). This was the first time the prosecution revealed that Adderly would be a witness for the State (T 2-3, 73-74, 162, 198-99).

An agreement was made between Adderly and the State, with the consent of the Court, that if Adderly testified at appellant's trial "substantially" as he had at the hearing, he would be permitted to plead guilty to the crime of attempted robbery in the third degree at the conclusion of the trial.**

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*Between the second and fourth days of trial, counsel had sent an investigator to Bryant's last known address and found he no longer lived there. See coram nobis petition of trial counsel.

**Adderly had previously been convicted of manslaughter in the first degree and had served six years in state prison. As a second felony offender, premised on a plea to robbery in the first degree in this case, he faced a possible maximum sentence of sixty years' imprisonment. There was also pending against Adderly another felony indictment, which was to be covered by the reduced plea of attempted robbery in the third degree at the conclusion of the trial (T 178).

The condition upon which Adderly would be permitted to plead to a reduced charge at the conclusion of appellant's trial was carefully stated by the prosecutor:

> [Assitant District Attorney] Brownstein: ... The District Attorney has consulted with Mr. Segal, the attorney of record now of this defendant Adderly, and as a result of my conversation with Mr. Segal, we both in a forthright manner tried to come down to the justice of this case and to the truth of this case; and I had an understanding with Mr. Segal that if this defendant, Adderly, will tell the truth on the trial of this case, substantially as this record has it -- and I am, Mr. Stenographer, now ordering this record --
>
> The Court: Are you satisfied that all the facts have been developed?
>
> Mr. Brownstein: Yes, your Honor; substantially all the facts, missing a few details, that are not important at this point. If he does that, then there is a cleancut, forthright promise given to you in open court that the District Attorney will consent to the vacating of this plea taken now, of robbery in the first degree, and will be amenable to your offering to plead guilty to attempted robbery in the third degree, to cover all counts, as well as the other indictment.
>
> (T 73-74). Emphasis added.

The Court also impressed this proviso on Adderly:

> Did anyone make any promises to you other than the fact that if you tell the truth and testify against these defendants and if

> what you say will conform with what you just told the Court -- in substance, not in those words -- you will then get the consideration of having your plea reduced to attempt[ed] robbery in the third degree; was that the promise made to you?
>
> (T 72). Emphasis added.

Again, the Court told Adderly:

> You know, sir, if you don't repeat the truth, nothing else but the truth, from the witness stand -- and I assume that what you told me in response to the questions was the truth -- the plea of robbery in the first degree will stand? And do you understand, sir, there is absolutely no promise of any kind other than what has been communicated in open court? Do you still want to plead guilty as proposed?
>
> (T 75). Emphasis added.*

At trial, Adderly was the first witness for the State. He was on the witness stand one full day of the three days' testimony. Adderly testified substantially as did Mrs. Gardner regarding his and Polhill's roles in the execution of the robbery, except that he sought to minimize his own participation. Adderly named appellant as the third robber, and he testified that as soon as they had entered the apartment appellant and Polhill by-passed him while he was choking Mrs. Gardner. Searching through the rest of the apartment was the only activity appellant engaged in during the eight to ten minutes the three men were in the apartment.

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*The full text of the plea agreement is set out at Appendix F.

At trial, the defense repeatedly cross-examined Adderly as to whether he would be permitted to plead guilty to attempted robbery in the third degree at the conclusion of the trial if he did not testify substantially as he had out of the jury's presence, naming appellant as the third person, during the pre-trial proceedings. Without correction by the prosecutor, Adderly repeatedly denied that this condition was placed on his receiving the lesser plea:

> Defense Counsel: Mr. Adderly, you know very well, don't you, that it you do not include them in your statements here in the testimony, that you would not be offered the plea to attempted robbery in the third degree?
>
> Assistant District Attorney: I object.
>
> Defense Counsel: You know that, don't you?
>
> Mr. Adderly: No, sir.
>
> The Court: Let him asnwer.
>
> Defense Counsel: All right. Answer.
>
> Mr. Adderly: No, sir.
>
> Defense Counsel: You don't know that?
>
> Mr. Adderly: No, sir.
>
> (T 166).

* * * *

> Defense Counsel: The plea was conditioned upon the basis that you get on the witness stand, correct,

and tell your story?

Mr. Adderly: Yes.

The Court: Was it to tell your storn?

Mr. Adderly: To tell the truth; to speak the truth what happened on that alleged night, April 23rd.

(T 203).

Adderly was to repeat his denial that any condition had been placed on his receiving the lesser plea numerous other times (T 158, 165, 202).

The Court rebuked counsel for suggesting that Adderly would have to tell the same story in order to benefit from his agreement to testify, and in so doing supported Adderly's denials:

Defense Counsel: Then there came a time when you were offered a reduced plea, is that correct?

Mr. Adderly: Yes.

Defense Counsel: You know, don't you, that you were offered that reduced plea on the condition that you make the statement that you made here today?

The Court: That is not true. The Court participated in that.

(T 158).

* * * *

The Court: Well, it is untrue if you are referring to the time he offered his plea in court. Of course it is untrue.

(T 159).

The Court also participated heavily in the cross-examination of Adderly on this point, during which Adderly again denied he had to implicate appellant in order to get the reduced plea:

> The Court: You are not answering me, sir. I want to know whether or not it was your understanding that in order to earn the consideration that was offered to you, that you would have to say that these two men were implicated in the robbery with you?
>
> Mr. Adderly: In order to get the consideration? No, sir.
>
> The Court: Well, what were you to do for the consideration?
>
> Defense Counsel: May I have that answer?
>
> The Court: "No, sir," he said.
>
> The Court: What were you to do to gain the consideration that was offered to you?
>
> Mr. Adderly: To tell the truth what happened.
>
> (T 165).*

After the trial, the prosecutor was to acknowledge the "primary" importance of the accomplice Adderly's testimony:

> In my opinion the evidence of the People's witnesses needed reinforcement in order to obtain a conviction, and therefore I agreed to accept the within plea upon the

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* The full text of Adderly's testimony is set forth as appellant's appendix G.

promise of the defendant, to testify concerning the facts, as a State's witness. The other two defendants were convicted by a Jury of Robbery in the First Degree, primarily through the testimony of this defendant.

See statement pursuant to N.Y.S. Code Crim. Proc. §342-a.* Emphasis added.

E. The Undisclosed Psychiatric Condition of the Addomplice Witness

The State revealed at the pre-trial hearing on May 19, 1965, that Adderly would be a prosecution witness (T 2-3, 73-74, 162, 198-99). At the outset of the cross-examination of Adderly on the first day of trial, counsel requested to see all medical or psychiatric records relating to Adderly in the possession of the prosecution. The Assistant District Attorney stated that there was no such material in his "trial file" (T 148-49, 154). On the second day of trial, May 21, 1965, the Court signed, and ocunsel served, a subpoena duces tecum directing the Kings County Hospital to produce all psychiatric records relating to Adderly (T 517).

Under cross-examination on the second day of trial, Adderly testified that subsequent to his arrest he was admitted to the Kings County Hospital psychiatric ward for obser-

*This document will be made available to this Court upon request.

vation at the request of the warden of the detention facility (T 196). This was the total testimony the jury heard on the submect of Adderly's mental condition because the Court would not permit an inquiry into the circumstances of his commitment (T 196-98). Adderly was told to remain available for further examination (T 215-16, 218).

By the fourth, and final, day of trial, May 25, 1965, the Kings County Hospital had not complied with the subpoena issued in appellant's behalf. Out of the presence of the jury, counsel requested that the trial be continued until the psychiatric evidence which had been subpoenaed was produced. In denying the motion, the Court, out of the presence of the jury, stated:

> ... Maybe they are [vital]; maybe they're not. I am not going to speculate. If you subpoenaed them, punish them for contempt if they didn't bring them in.
>
> (T 517).

At the coram nobis hearing held subsequent to trial, the records of Kings County Hospital revealed Adderly's psychiatric history during the pendency of the trial. He was in the hospital in mid-April 1964, when he was diagnosed as a "social pathic personality, disturbance, antisocial personality" (HH 29*). He was there again on April 28 and 29, 1964, because

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*References denoted "HH" are to the minutes of the coram nobis hearing held on October 3, 1968.

he was uncooperative (HH 29-30). Adderly was returned to the hospital a third time at the request of Dr. Emanuel Saland, a psychiatrist at Queens Branch House of Detention for Men, on May 4, 1964. In a letter dated May 4, 1964, to the admitting physician at Kings County Hospital, Dr. Saland stated the following:

> ... He said Mr. Adderly was irrelevant, incoherent, hostile, agitated -- he used foul and obscene language. He also said he was delusional in the paranoid area. He said, for example, "My mother and my lawyer are downstairs trying to get me out, but they killed my mother" -- His affect was blunted, inappropriate, insight and judgment defective. And that he has -- he had not eaten for the past couple of days. Diagnosis impression: paranoid schizophrenia.
>
> (HH 23-26).

On the following day, May 5, 1964, a psychiatrist at Kings County Hospital, Dr. Winkler, wrote a letter to the Presiding Justice of the Criminal Court, Kings County, stating he had reason to believe Adderly suffered from a mental disturbance, and he requested that the Court issue a formal order for a commitment of Adderly for psychiatric observation (HH 31).

On May 11, 1964, this case was on the calendar in Criminal Court, Kings County (HH 27), and the application of Dr. Winkler for a formal order of commitment was denied in the following manner:

> The Court: I have a recommendation to have Adderly sent to Kings

County for observation. Committed to Kings County for observation? Mr. Martin, do you swear to the truth of the affidavit you signed?

[Police Officer] Martin: I do.

Court Officer: Do you waive the reading of the complaint and the rights?

[Lucas' Counsel]: I do.

[Adderly's Counsel]: Your Honor, I have spoken to the parents of the defendant, and they say there is nothing wrong with him, Norman Adderly.

The Court: If they object, I won't send him for observation. I don't care.

Minutes of People v. Watts, Bryant, Edwards, Polhill, Adderly, and Lucas, Criminal Court, Kings County, Doc. Nos. A3740-A3746/1964, May 11, 1964, at 2-3 (Schor, J.)

On May 11, 1964, Adderly was returned to the Queens House of Detention (HH 27). At the time of his discharge, Dr. Jiminez, one of the doctors at the detention facility, diagnosed Adderly as an anti-social personality because he was without benefit of a further examination (HH 28).

Dr. Jiminez testified that paranoid schizophrenia is a mental illness in which the individual develops delusions of persecution or delusions of grandiosity (HH 25). He was asked the following hypothetical question:

If the condition existed, assum-

> ing Doctor this condition existed during the course of a trial which this defendant would have to testify, would [it] have an effect on answers which he would give to --

The District Attorney objected, and the Court sustained the objection (HH 25).*

The doctor testified that in order to determine whether Adderly was a paranoid schizophrenic a year later at trial, Adderly would have to have been subjected to an examination at the time of trial (HH 28).

At the coram nobis proceeding, Adderly testified that he remembered the trial in which he testified against appellant. He denied he had been committed to any hospital for psychiatric help during the course of the proceedings (H 3**).

However, he said that approximately a month and a half before the beginning of the trial (May 20, 1965), he complained about a "headache" and was admitted to Kings County Hospital where he remained for about five days. He denied that any of the personnel at the hospital talked to him about his condition, and he denied that he was interviewed by any doctors

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*Similarly, the doctor was not permitted to testify whether this condition would affect Adderly's competence (HH 28) or his credibility (HH 30) as a witness. The doctor was asked whether he disagreed with Dr. Saland's findings that Adderly was a paranoid schizophrenic suffering from delusions at the time of the examination, and the Court stated, "Don't answer that question ..." (HH 26).

**References denoted "H" are to the minutes of the coram nobis hearing held on May 20, 1968.

in Kings County Hospital. The headaches continued to come and go after he left the hospital, but he denied having had any headaches during the trial (H 3-5). He repeated that he had been in the hospital only once (H 10), and that it had been approximately a month before the trial (H 9).

It was noted that Adderly's testimony was untrue on several points and reflected a lapse of one year in his memory (H 11). The Court ruled that counsel could not cross-examine Adderly for the purpose of establishing his incompetence at the time of the trial (H 7-8).

Adderly testified that the District Attorney's office knew he had been at Kings County Hospital because that office had brought him from the hospital to court:

> Defense Counsel: Did you make [the headaches] known to the Kings County Hospital through the District Attorney's office?
>
> Adderly: Well, I didn't make it know [sic] but I thought they knew it. They brought me from the hospital to court.

(H 4).

Bernard Brownstein, the Assistant District Attorney who prosecuted the case, testified that at the time of trial he had no personal knowledge that Adderly had been committed to Kings County Hospital for psychiatric observation, and that he did not withhold such information from the defense (HH 5-6, 9-10).

After the hearing, the application for writ of error

coram nobis was denied.

F. Other Evidence Relating to the Crime

Detective Arthur Broughton testified that on the night of the robbery he and five other detectives (Ott and Nelson from the 79th Squad and O'Brien, Dean, and Wamsley from the Narcotics Squad) were assigned to a stakeout of Adderly's residence. Broughton was situated in an unmarked car about 150 feet away (T 373-75, 384, 394-95).

After about an hour, when it was dark, he observed a white 1955 Cadillac convertible bearing license plate number 5L9598 pull up outside the premises (T 374-76, 284-85, 399).* Although there were other persons walking on the dark street at that time, Broughton said he observed the face of the driver of the Cadillac as he went from the car to the house for "several seconds," and he testified that the driver was appellant (T 385, 375).

About fifteen minutes later, the witness observed Addelry, Polhill, and the driver leave Adderly's house and enter the white Cadillac (T 375-76, 399). The witness and the other detectives followed the car from about a block behind until about 9:30 p.m. At that time the car was parked about

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*No evidence was introduced as to the name under which the car was registered. In summation the District Attorney argued that the 1955 car observed by the detective was "similar" to the 1954 car owned by appellant (T 563).

two hundred feet from the victims' building, and the witness and the other officers continued on and left the area (T 377-79, 387).

Detective Broughton repeatedly testified that only three men had entered the car, and that he was "certain" that only three men were in it while it was being followed (T 375, 376, 377, 399-400. Emphasis added).

In contrast, Adderly repeatedly testified that four men -- Adderly, Polhill, appellant, and James Brown -- had entered the car together and proceeded from his house to the area of the victims' house (T 109, 113-14, 116, 126, 142, 187).

The fourth man, James Brown, whom the detective was apparently unable to see, was the nephew of Adderly's girlfriend, and was a fourth accomplice in the robbery (T 109, 111, 174, 195). Adderly testified that appellant had arrived at 9:30 p.m., and that all four men left together immediately afterwards (T 21, 109, 113-14). James Brown had first suggested the scheme to rob Mrs. Gardner of the "hit money," which was thought to be about $5,000, and Brown waited in the car during the robbery and afterward received a fourth of the proceeds T 111-12, 194-95). Brown was never apprehended or tried.

G. The Defense

Appellant testified on his own behalf. He was employed as the superintendent in seven buildings on his block.

Appellant's only previous conviction was for a misdemeanor in Montgomery, Alabama (T 442, 461-66).

Appellant denied that he had participated in the robbery of Mrs. Gardner (T 444-45, 447, 456, 460-61). He never owned a Beretta pistol (T 446). In April 1964 he had not known Adderly very well (T 447, 451-53).

At about 6:00 p.m. on the night of the robbery, appellant was in Bob's Barber Shop at 724 Fulton Street (T 443). About 7:45 p.m. he went to a service station located at the corner of Atlantic Avenue and Clinton Street to put a new transmission into his car, a two-door white 1954 Cadillac (T 547), which was towed to the station. The transmission had been obtained from Tom Livingstone, and appellant and Clarence Wallace started working on the transmission about 8:30 p.m. After being unable to get the transmission in, at about 11:00 p.m. they went to a bar located at 722 Fulton Street, where they remained until 12:30 or 1:00 a.m. Then appellant went home (T 433-44).

Appellant testified that, when arrested, Broughton informed him that he was investigating a hit and run case. When appellant denied involvement in a hit and run case and asked for time to call an attorney, the detective told him it was unimportant and to get dressed (T 445-46). Appellant arrived at the 79th Precinct about 4:45 p.m. and, although he was questioned about a hit and run accident, he was never questioned about an assault and robbery while at the station

house, and did not know what the charges were until he was arraigned in court (T 446, 449-50).

Mrs. Viola Jackson, who testified under subpoena for Polhill, was Adderly's girlfriend, and resided with him at the time of the crime (T 470, 489, 498). She stated that appellant was not present in the house with Adderly and her nephew, Brown, on the night of the robbery (T 474-76).

Clarence Wallace, an automobile mechanic who was employed by the Flying-A service station at the corner of Atlantic Avenue and Clinton Street during April 1964, testified in appellant's behalf (T 503, 509). He had known appellant only as a customer at the service station, and he had sold appellant a 1954 white Cadillac in early April 1964 (T 504). The only car he had sold from 1964 to the time of the trial was the car he sold appellant (T 515).

Appellant told him that the car had some "bugs" to be worked out, so Wallace told appellant to bring the car to the service station on the night of April 23, 1964, when he was working the night shift (T 503-04).

Appellant arrived at the station between 7:00 and 8:00 p.m., and the two men attempted to put a new transmission into the car. After working unsuccessfully for several hours, Wallace closed the station about 11:00 p.m. Appellant had worked on the car with Wallace from 7:00 or 8:00 p.m. until 11:00 p.m. when the station closed (T 504-05). Wallace then joined appellant at a bar on Fulton Street where they remained

together for several hours until 1:00 or 2:00 a.m. (T 506). Wallace heard appellant had been arrested about a week after the night they had worked on the car together (T 507).

The jurors began their deliberations at approximately 4:00 p.m. After eight hours, they returned a verdict of guilty.

H. The District Court Opinion

The District Court found that Ulysses Bryant was clearly a relevant and material witness for the defense on the issue of the identification of appellant as the third robber, bout found that the continuance was properly denied because the defense had four days in the midst of trial to locate him. The District Court also found that appellant "knew" Bryant.

The District Court found that a continuance to obtain Adderly's psychiatric records was properly denied because they had not been produced four days after they were subpoenaed, and because the defense was speculating as to the contents of the records.

The District Court found no suggestiveness in the show-up of appellant, and that Mrs. Gardner had not been sure of her identification of Bryant.

Finally, the District Court felt that Adderly's testimony that he was promised the lesser plea if he told the truth adequately permitted the jury to assess his motives for testifying.

ARGUMENT

Point I

THE TRIAL COURT'S REFUSAL TO GRANT A CONTINUANCE (A) SO THAT THE DEFENSE COULD LOCATE ULYSSES BRYANT AND (B) OBTAIN COMPLIANCE WITH ITS SUBPOENA FOR ADDERLY'S PSYCHIATRIC RECORDS DEPRIVED APPELLANT OF HIS SIXTH AND FOURTEENTH AMENDMENT RIGHTS.

In this case, the trial court denied appellant due process by refusing to grant a continuance to locate Ulysses Bryant, whose testimony was critical on the issue of identification, and to obtain compliance with a subpoena for the psychiatric records of the accomplice-witness Adderly. The circumstances of the denial of a continuance in this case demonstrate that it was completely arbitrary and unjustified, and totally precluded appellant from making his defense of mistaken identification. It deprived appellant of his Sixth Amendment right to compulsory process (Washington v. Texas, 388 U.S. 14 (1966)), and resulted in a violation of due process.

A. The failure to give counsel adequate time to find Ulysses Bryant is a violation of due process.

The record reveals that three days after the commission of the crime, Mrs. Gardner went to the station house and identified Adderly, Polhill, and Ulysses Bryant, out of a line-

up, as the three robbers. Several hours later Adderly, Polhill, and Bryant were shown to her individually, and she confirmed her earlier identification of Bryant as the third robber. None of this was disclosed to appellant's counsel prior to trial, held more than a year later. Counsel first learned of Mrs. Gardner's original identification of Ulysses Bryant as the third robber when he received the stenographic transcript of her station house identification for purposes of cross-examining her on the second day of the trial. Counsel dispatched an investigator to Bryant's last known address in an unsuccessful attempt to locate him. On the fourth day of the trial (four days after he first learned of the prior identification because there was an intervening weekend) counsel's request for a continuance in order to locate and produce Bryant on the issue of identification was denied.

Ulysses Bryant's presence was critical to the defense because he had originally been identified by the complainant in a station house line-up as the man who committed the acts subsequently attributed to appellant. Indeed, the opinion of the District Court found Bryant to be a relevant and material witness:

> ... He was clearly a material and relevant witness for [appellant] to question for the jury to see and hear so that it could evaluate Mrs. Gardner's identifications.
>
> Appendix B, at 4.

Under the circumstances of this case, the denial of a continu-

ance to locate and produce Bryant was totally unjustified. As the Supreme Court has stated:

> A myopic insistance upon expeditiousness in the face of a justifiable request for delay can render the right to defend with counsel an empty formality.
>
> Ungar v. Sarafite, 376 U.S. 575, 589 (1964).

The request for delay here was justified and was made after demonstration of good faith need by the defense. The need for the delay was in fact caused by the State, which failed to fulfill its obligations under Brady v. Maryland, 373 U.S. 83 (1963), to disclose this exculpatory evidence prior to trial. With proper disclosure the defense would have had weeks or months to locate Bryant.

Further, it appears that the prosecutor's suppression of Mrs. Gardner's original identification of Bryant was deliberate.* In classifying the kinds of exculpatory evidence suppressed by the State, this Court has stated:

> The easy cases -- at least they seem so now -- are where the prosecutor's suppression was "deliberate," by which we include not merely a considered decision to suppress, taken for the very purpose of obstructing, but also a failure to disclose evidence whose high value to the defense could not have escaped the prosecutor's attention.... [Citation omitted]. Such cases rarely present a problem

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*Obviously counsel could make no request as to Bryant since he had no idea Bryant had been identified.

> as to "the degree of prejudice which must be shown;" almost by definition the evidence is highly material.
>
> United States v. Keogh, 391 F.2d 138, 146-47 (2d Cir. 1968). Emphasis added.

The original identification of Bryant as the third robber was clearly "evidence whose high value to the defense could not have escaped the prosecutor's attention," and, even without a request, it should have been disclosed prior to trial.

Faced with such a surprise in the heat of trial, due process requires that the defendant be given a reasonable opportunity to locate a material witness. Avery v. Alabama, 308 U.S. 444, 450-52 (1939). That opportunity was improperly denied to appellant. Defense counsel acted with dispatch by sending an investigator out to Bryant's last known address in an unsuccessful attempt to locate him. (See coram nobis petition). While the defense could not locate Bryant in the short time provided, that did not establish that Bryant was unavailable. In Avery v. Alabama, supra, 308 U.S. at 450-52, counsel in a small rural county with a population of less than 1,000 people had three days to locate witnesses and prepare their case, and their request for a continuance was denied. In affirming, the Court noted that, "unlike metropolitan centers," people knew each other, so counsel had been able to make inquiries and exhaust every possible of defense preparation in the three days provided. Id.

While three days may be a reasonable opportunity to

locate a witness in a small rural county, four days in the heat of trial was not a fair opportunity to find an elusive criminal in New York City with its 8,000,000 residents. Further, the mere fact Bryant had moved in the year between the complainant's original identification of him and the trial did not establish his unavailablity so as to necessitate the conclusion that additional search would be fruitless. Time to employ more thorough investigative techniques might have proved fruitful. Defense counsel did request the prosecution to cooperate in producing Bryant (T 515). Bryant was Adderly's cousin, and the prosecution had control over Adderly. Under these circumstanses, Brady obligated the prosecution to use Adderly to assist in locating Bryant. It could not be said that Bryant was unavailable until that source of information was explored. Instead of cooperating, the prosecution encouraged the Court to terminate the trial.

Under this Court's analysis in United States v. Keogh, supra, 391 F.2d at 146-47, there should be no need to show prejudice because the exculpatory value of the evidence was obviously high and the prosecutor's suppression was deliberate. Measuring the prejudice by the effect of the suppression on the preparation of the defense, United States v. Polisi, 416 F.2d 573, 577 (2d Cir. 1969), however, it is clear that the suppression prejudiced appellant in the extreme.

To assess Mrs. Gardner's ability accurately to identify the third person, it was crucial that the jury observe

Bryant and appellant standing side by side in illustration of the disparity in their appearances. VIII Wigmore, Evidence, §§2116, 2220, 2265 (3d Ed. 1940). Bryant, the cousin of the accomplice Adderly -- a fact never learned by the jury* -- did not resemble appellant in physical appearance. Bryant was twenty-five years old and clean shaven. Appellant was thirty-nine and bearded. A physical comparison would have been a "proper and graphic demonstration" of the unreliability of the complainant's subsequent identification of appellant. See People v. Williams, 3 A.D.2d 967 (4th Dept. 1957).

This case is analogous on its facts to United States v. White, 324 F.2d 814 (2d Cir. 1963), wherein the defense sought and was denied a continuance to produce a known informer, who was ill at the time of trial, to testify on the defense of entrapment. In reversing and remanding for a new trial, this Court stated:

> A significant aspect of appellant's defense was his claimed ignorance of a potential supplier and his reluctance to engage in the transaction. The truth of these assertions depended on what transpired when appellant and Lynn first met and conversed outside Copland's hearing. There was no other way for appellant to substantiate his defense. Thus, the testimony sought to be adduced

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*Adderly mentioned that Bryant was his cousin only in the pre-trial proceedings, and did not repeat it at trial. During the pre-trial proceedings counsel did not know of the prior identification of Bryant, had no reason to focus on it or to remember it, and did not bring this fact out to the jury.

> would not have been merely cumulative, and would have done more than impeach the Government witnesses.
>
> (Id., at 816).

Here, appellant's defense was mistaken identification and alibi. The best way for appellant to establish the unreliability of the complainant's identification of him was to produce Bryant for the jury to see. The victim could not give a description of Bryant. Thus, without Bryant's presence, appellant would have to resume the stand, after the People rested and the continuance was denied, to describe Bryant as having been twenty-five and clean-shaven. Bryant's presence would have taken the element of appellant's credibility on the description out of the case, and therefore was not cumulative in nature. Appellant was entitled to have the jury see Bryant in person and to have the jurors ponder how Mrs. Gardner's identification could be reliable if she could identify two men of such different age and appearance as having been the third robber. As in United States v. White, supra, Bryant's presence was the best way appellant could substantiate his defense.

It was also essential that the jury hear Bryant examined as to his activities on the night of the crime. Only one person could have been the third robber. Not only did Mrs. Gardner originally identify Bryant as the third robber, but he was also arrested in the same car containing Adderly, Polhill, and the gun Polhill used in the robbery. The evidence pointing toward Bryant was sufficiently strong to sustain a legal infer-

ence under New York law that Bryant was the guilty person, People v. Guernsey, 24 A.D.2d 811 (3d Dept. 1965), and it was also sufficient to permit counsel to examine Bryant as to whether he was the third robber. I Wigmore, Evidence, §§139, 142 (3d ed. 1940).

If Bryant chose to invoke the Fifth Amendment on the witness stand, under New York law the jury was entitled to hear him claim the privilege and draw appropriate inferences. People v. Owens, 272 N.Y. 215 (1936).

Contrary to the factual assertion in the opinion below (at 4), appellant did not "know" Bryant, and neither appellant nor counsel knew of the prior identification until the second day of trial (T 522). Appellant had never seen Bryant until both were in the station house on the night of the arrests. Appellant saw Bryant only once more, in detention, about a week later.

Further, when appellant was at the station house, he had no reason to know he and Bryant were there on the same matter. Both Detective Broughton and appellant testified that appellant was brought to the precinct on the pretense of a hit and run investigation, and appellant testified he did not know he was involved in a robbery investigation until arraignment in court. Thereafter appellant was in jail for more than a year prior to trial, held on $7,500 bail, while during this year Bryant was free. Having no knowledge of or acquaintance with Bryant, and having seen Bryant only twice in his life,

appellant had no way to find him, especially since he was incarcerated for the year between then and trial.

Under all the circumstances in this case, the denial of the continuance was a myopic insistence on expeditiousness. The State had violated the right to a fair trial by keeping Bryant's prior identification as the third robber secret in violation of Brady for more than a year prior to trial. Once the secret became known on the second day of trial, the defense acted diligently in an attempt to locate Bryant. Whereas the defense should have had weeks or months to locate Bryant, four days in the midst of trial to locate him in a city of 8,000,000 people was not a fair opportunity to compel his attendance. Bryant's importance to the defense is obvious -- he was the most critical defense witness on the key issue of the identity of the third robber. The request for a continuance to locate Bryant was reasonable, and its denial substantially impaired appellant's defense of mistaken identification. United States v. Ellenbogen, 365 F.2d 982, 985-86 (2d Cir. 1966). Under all the circumstances, the denial was grossly arbitrary and capricious, and egregiously denied appellant a fair trial.

B. The Court violated due process by denying appellant a continuance to secure compliance with the Court's subpoena for Adderly's psychiatric records.

Throughout the State appellate courts, and in its opposition to certiorari, the prosecution conceded that the denial of the continuance to secure Adderly's medical records was constitutional error, but maintained the error was harmless. In fact, the error was highly prejudicial.

Here, the jury was left with the impression that the accomplice Adderly was a normal person of average mental stability. Under cross-examination on the first day of trial Adderly stated only that he had been sent to Kings County Hospital for a routine psychiatric examination at the request of the warden, which apparently resulted in no indication anything was wrong with him. That was the only testimony the jury heard as to Adderly's mental condition (T 196-98).

The hospital records as to Adderly's psychiatric history had been subpoenaed immediately upon the defense's learning, during Adderly's cross-examination on the first day of trial, that he had been committed to Kings County Hospital for psychiatric examination during the pendency of the proceedings.*

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*The prosecutor repeatedly stated that Adderly had agreed to testify for the State on the day before trial (T 2-3, 73-74, 162, 198-99); thus, before that the defense had no reason to investigate Adderly's mental history.

The Court signed, and counsel served, the subpoena on the second day of trial, but by the fourth day of trial the records still had not been produced, and the Court denied a continuance to secure compliance with the subpoena it had signed simultaneously with the denial of a continuance to locate Bryant. Under New York law, the defense would have a basis for challenging Adderly's very competence to testify at all, or to have the jury at least weigh the contents of the records on the question of Adderly's credibility. People v. Rensing, 14 N.Y.2d 210 (1964).

Contrary to the opinion below (at 6), without the subpoenaed psychiatric records the defense had no grounds to place Adderly's mental condition in issue. Without the subpoenaed records the defense had no way to impeach the false testimony Adderly gave concerning his psychiatric history, and had no grounds to call expert witnesses to challenge his competence. The defense was not aware of Adderly's mental problems until he was cross-examined, and, without the records, appellant was, in effect, bound by Adderly's false testimony about his mental history.

As was brought out at the coram nobis hearing, had the jury heard that Adderly had, in fact, been in Kings County Hospital for psychiatric treatment three times during the pendency of the proceedings -- not once, as he testified at trial -- the jury would have had good reason to doubt Adderly's veracity.

Further, had the jury known, as Dr. Saland reported, that Adderly was "irrelevant" and "incompetent," and that he suffered from paranoid delusions -- such as that "they" killed his mother when she came to visit him in jail -- the jurors would not have viewed his testimony as that of a normal person.

Had the jurors known that Dr. Saland preliminarily diagnosed Adderly as a paranoid schizophrenic, and that it was contrary to medical advice that he was not committed for further psychiatric evaluation, it is impossible to know what credence or weight they would have attached to his testimony. People v. Rensing, supra, 14 N.Y.2d at 214.

The subpoenaed, but not produced, records would have had a greater impact on the jury than the letter written by an accomplice which caused this Court to reverse in United States v. Pacelli, Doc. No. 73-2137 (2d Cir. January 11, 1974), slip opinion 1347 at 1367-68.

The psychiatric records which the defense was precluded from using here were a far more valuable tool to discredit Adderly's testimony than the hidden facts which caused a reversal in United States v. Miller, 411 F.2d 825 (2d Cir. 1969). In Miller, the prosecution failed to reveal that an accomplice witness had been hypnotized in order to refresh his recollection as to certain evidence. Here, the defense was completely precluded from arguing in summation that Adderly was mentally ill, and that his sickness affected his credibility. This line of summation, especially when connected with the bla-

tant discrepancy between Adderly's and Detective Broughton's testimony -- Adderly's, that there were four, and Broughton's, that there were three, men in the car on the way to the robbery -- might have swayed the jury's assessment of Adderly's veracity.

Moreover, as the diagnosis of paranoid schizophrenia and the unheeded recommendation for further psychiatric commitment were made only one year prior to trial while the indictment herein was still pending, the evidence of Adderly's mental illness was more compelling and far closer to the time of trial than the fifteen-year lapse which caused the reversal in People v. Rensing, supra, 14 N.Y.2d at 210. Contrary to the opinion below (at 6), at the coram nobis hearing Dr. Jiminez testified that the only way to determine whether Adderly was a paranoid schizophrenic at the time of trial would have been to conduct a contemporaneous examination of him at that time (HH 28).

Without the subpoenaed records, the defense had no basis to call expert witnesses to challenge Adderly's very competence to testify. Had the defense obtained the records, appellant could have used experts to place Adderly's competence in issue. Without the psychiatric records, there were no facts upon which an expert could base an opinion. People v. Rensing, supra, 14 N.Y.2d at 214.

Without the subpoenaed psychiatric records the jury had every right to believe Adderly was telling the truth and was perfectly normal. This was a subpoena the trial judge him-

self had signed, agreeing that the records were relevant to impeach Adderly, and it was the Court's duty to enforce the subpoena and compel the hospital to produce the records rather than to terminate the trial abruptly. The opportunity to cross-examine is useless unless the examiner is permitted to ascertain the facts to discredit a lie.

The State concedes that the denial of a continuance to enforce the subpoena was constitutional error. As the complainant's identification of appellant was not strong (see infra, Point II), the prosecution also conceded that Adderly was the "primary" witness for the prosecution, and that the other evidence as to appellant "needed reinforcement in order to obtain conviction." (See statement pursuant to former Code Crim. Proc. §342-a). The failure of the Court to permit counsel to secure and adequately examine these records, thereby precluding the defense from discrediting the principal State witness, who was an accomplice, cannot be viewed as harmless to appellant. United States v. Miller, supra, 411 F.2d at 832; United States v. Zborowski, 271 F.2d 661 (2d Cir. 1959); People v. Rensing, supra, 14 N.Y.2d at 214.

Point II

THE STATION HOUSE SHOW-UP OF APPELLANT WAS SO CONDUCIVE TO IRREPARABLE MISTAKEN IDENTIFICATION AS TO VIOLATE DUE PROCESS.

The pre-trial identification of appellant by Mrs. Gardner was unnecessarily and impermissibly suggestive. Further, the circumstances demonstrate that there was a substantial likelihood of irreparable mistaken identification of appellant as the third robber. Accordingly, the judgment should be reversed and a new trial ordered. Neil v. Biggers, 409 U.S. 188 (1972); Foster v. California, 394 U.S. 440 (1969); Stovall v. Denno, 388 U.S. 293 (1967).

It cannot be disputed that the show-up was unnecessarily and impermissibly suggestive. Three days after the robbery Mrs. Gardner went to the station house and selected Adderly, Polhill, and Ulysses Bryant from a line-up as the three robbers. Several hours later these three men were brought in individually by the Assistant District Attorney, and she confirmed her identification. Contrary to the opinion below (at 7), this show-up did not consist of a parade of theretofore unseen men. Rather, it consisted of Adderly, Polhill, and Bryant. Appellant appeared alone in a show-up before Mrs. Gardner ninety minutes later.

This show-up of appellant a substantial time after the line-up in which he did not participate and after the con-

clusion of the parade of the other three men must have suggested to Mrs. Gardner that the police and prosecutor believed her original identifications were mistaken or that appellant was a participant in the robbery. Neil v. Biggers, supra, 409 U.S. 196-97; Foster v. California, supra, 394 U.S. at 493.

Not only was the procedure suggestive, it was unnecessarily suggestive. Unlike the victim in Stovall, Mrs. Gardner was not injured or indisposed at the time. As Bryant and the other defendants had been placed in a line-up earlier that day, there was no valid reason why appellant could not also have been displayed to Mrs. Gardner in a line-up.

The central inquiry, then, is whether under the totality of circumstances Mrs. Gardner's "identification was reliable even though the confrontation procedure was suggestive." Neil v. Biggers, supra, 409 U.S. at 199. This Court has stated that the question is

> ... whether the procedure found to have been "unnecessarily" or "impermissibly suggestive was "so conducive to irreparable mistaken identification" [Stovall] or had such a tendency "to give rise to a very substantial likelihood of irreparable misidentification [Simmons] that allowing the witness to make an in-court identification would be a denial of due process.
>
> United States ex rel. Phipps v. Follette, 428 F.2d 912, 915 (2d Cir. 1970).

The Supreme Court has stated:

> The factors to be considered in evaluating the likelihood of misidentification include the opportunity of the witness to view the criminal at the time of the crime, the witness' degree of attention, the accuracy of the witness' prior descriptions of the criminal, the level of certainty demonstrated by the witness at the confrontation, and the length of time between the crime and the confrontation.
>
> Neil v. Biggers, supra, 409 U.S. at 198-99.

Mrs. Gardner's opportunity to observe the third robber at the time of the crime were minimal. She testified that the third person moved in and out of the rooms of the apartment searching for money, and had no physical contact with her (T 286, 288-89, 341-42, 348). Further, Adderly tied her to a bed with her face down (T 286, 290-91, 364, 365). She was so hysterical that she did not know how much time elapsed during the incident (T 293-94).

Moreover, Mrs. Gardner's attention was not on the third robber, it was focused on Adderly, who had put a gun to her head as soon as the door was open, held the gun to her head throughout the entire incident, and threatened three times to kill her (T 278, 284-86, 287, 290-91, 303). Thus, Mrs. Gardner's attention was focused on Adderly and the gun he held at her head, not on the third person searching the apartment. United States ex rel. Rivera v. McKendrick, 448 F.2d 30, 34 (2d Cir. 1971).

Mrs. Gardner gave no prior description of the third robber, except to say that she could remember the robbers' faces. She originally identified Bryant as the third robber, and he was clean-shaven and twenty-five years old. If Mrs. Gardner's original identification is taken as a description, it is clear that appellant did not fit her original description. Appellant was bearded, and thirty-nine years old. The dissimilarity in appearance is striking, and it indicates that Mrs. Gardner's subsequent identification of appellant is not reliable.

Mrs. Gardner's level of certainty during the confrontation with Bryant was high. The transcript of her station house confrontation with Bryant containts a definite and positive identification of him as the third robber who searched the apartment for money (T 320-22).

Contrary to the opinion below (at 8), the transcript of Mrs. Gardner's station house identification contains no expression of doubt as to Bryant's having been the third robber. The prosecutor conceded that the transcript contained no expression of doubt (T 320-22, 328). At trial she did testify that she had been uncertain about Bryant, but, as the transcript does not reflect uncertainty, it is likely that her trial testimony was subsequently provoked to explain her change of mind.

Although Mrs. Gardner's subsequent identification of appellant was equally certain, it came as a result of a sugges-

tive show-up. The fact that she made equally certain identifications of two men, one clean-shaven and one bearded, only three days after the commission of the crime indicates she did not have a very clear impression of what the third robber looked like.

Mrs. Gardner's inability to make a reliable identification of the third robber is heightened by the fact that she mistakenly believed he had worn a hat during the commission of the crime. She testified that only one of the three men had worn a hat (T 354-55). At the station house, when Bryant was brought in alone without a hat, she asked that he wear a hat. Then, with Bryant wearing a hat, she gave a positive identification of him as the third man (T 320-21). Detective Broughton testified that only Polhill had been wearing a hat (T 398).* This further conflict is another factor challenging Mrs. Gardner's ability to identify the third robber.

The totality of the circumstances points strongly to the conclusion that Mrs. Gardner's in-court identification was the result of irreparable mistaken identification: the lack of substantial opportunity to observe the third robber, the distraction of Adderly's holding the gun to her head, the original identification of another person (Bryant), the dissimilarity in age and appearance between the two men, the mistake as to

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*Mr. Gardner, who saw only Polhill, testified that Polhill was wearing a hat (T 238-39, 248-49, 251).

the third robber's wearing a hat, and the thwarting of the defense from producing Bryant at trial make this a case where the possibility of irreparable mistake was very high indeed. Neil v. Biggers, supra, 409 U.S. at 198-99.

Given the paucity of the other evidence implicating appellant as the third robber, it cannot be said that the error in admitting Mrs. Gardner's in-court identification testimony was harmless because it was "reasonably probable that the jury was swayed by the invalid testimony." United States ex rel. Springle v. Follette, 435 F.2d 1380, 1384 fn.4 (2d Cir. 1970); United States ex rel. Phipps v. Follette, supra, 428 F.2d at 916-17.

The accomplice Adderly's testimony was inherently suspect, and under New York law required corroporation. Code Crim. Proc. §399. Added to this was the effect of the promise to Adderly. Apart from the highly suspect testimony of Adderly, the only evidence tending to connect appellant to the commission of the crime was that of Detective Broughton. Broughton identified appellant based on "several seconds" of observation" in the dark of night made from 150 feet away (T 375, 384-85). The detective's ability to observe from his position was so poor that he did not observe the fourth man in the car. He was "certain" he saw three men in the car during the ten minutes he had it under observation (T 399-400, 375-77), but Adderly testified that in fact there were four men and the fourth man never went into the apartment (T 109, 113, 116, 126, 142, 187). The

detective said he had previously seen appellant once before on the street, but could not remember where or when (T 386). This circumstance made him susceptible to unconscious suggestion leading to mistaken identification.* Wall, Eye-Witness Identification in Criminal Cases, 119-22 (1965). Without Mrs. Gardner's in-court identification, the only other evidence tending to connect appellant to the crime was this "fleeting" identification by one detective -- which was undercut by Adderly's testimony -- and it cannot be said that Mrs. Gardner's identification was harmless error. United States ex rel. Phipps v. Follette, supra. 428 F.2d at 916; People v. Caserta, 19 N.Y. 2d 18, 24 (1966).**

Even if the jury believed Detective Broughton's "fleeting" identification, it did not place appellant inside the apartment where the robbery took place. As the detective ceased observation when the four men were parked 200 feet from the victims' building (T 377-79, 387), he could not testify which three had robbed the complainant in her apartment. Only the accomplice Adderly testified it was appellant who participated in the robbery, and not the fourth man "unseen" by the

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*None of the other five detectives who were present testified, apparently because they could not identify appellant.

**In Caserta, the only corroboration of the accomplice's testimony was made by a police officer who had made a split-second observation of the defendant driving past the officer's parked radio car at night. The strength of the evidence under these circumstances was not such that error could be regarded as harmless. People v. Caserta, supra, 18 N.Y.2d at 21-22, 23-24.

detective, and, absent Mrs. Gardner's tainted testimony, the jury had to rely exclusively on Adderly's word for the identity of the third robber.

Unlike the case against Polhill, the case against appellant relied heavily on Mrs. Gardner's testimony. Polhill was arrested in the same car with Adderly and Bryant, and the gun used by Polhill in the robbery was found in the car. No gun was found in the search of appellant's apartment, and none was admitted into evidence against him. Polhill was positively identified out of a line-up and at trial by both Mr. and Mrs. Gardner. Mr. Gardner never saw the third robber. The jurors in this case deliberated for eight hours. The strength of the evidence against Polhill must result in the conclusion that their deliberations were about appellant.

Nor can it be said that the record demonstrates with any degree of certainty that the "right man" was convicted in this case. The transcript of Mrs. Gardner's identification of Ulysses Bryant as the third robber does not contain the expressions of doubt she later claimed; to the contrary, it records a positive identification. The line-up procedure during which she identified Bryant is designed to eliminate mistaken identification by providing for a higher degree of reliability than a show-up. Wall, Eye-Witness Identification in Criminal Cases, supra, at 103. There is no evidence in the record which indicates that her original identification was wrong.

Point III

THE FAILURE OF THE COURT AND PROSECUTOR TO CORRECT ADDERLY'S FALSE TESTIMONY THAT HE WOULD BE PERMITTED TO PLEAD GUILTY TO A LESSER CRIME EVEN IF HE DID NOT INCULPATE APPELLANT DEPRIVED APPELLANT OF DUE PROCESS.

Prior to trial Adderly pleaded guilty to robbery in the first degree. At that proceeding Adderly implicated appellant in the crime. During this pre-trial proceeding, Adderly was told that if he testified against the co-defendants in substantially the same way he had at the plea proceeding he would be allowed to change his plea to a plea of guilty to attempted robbery in the third degree. The Court and the prosecutor told Adderly he would not be permitted to plead guilty to this incredible reduction in the charge "unless" he testified "substantially" as he had at the pre-trial proceedings when he implicated appellant as the third robber. The Court explicitly told Adderly there would be no reduced plea at the conclusion of trial unless he testified "against these defendants," and that his testimony must "conform" with what he had said at the hearing (T 72-75).*

During cross-examation of Adderly at the trial, he repeatedly denied that he had to "make the same statement" or "say that these two men were implicated in this robbery" in

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*The minutes of this proceeding are annexed as Appendix F.

order to receive the lesser plea. Adderly testified that he could enter the lesser plea if he would only "tell the truth." The Court and the prosecutor remained silent, allowing the jury to conclude that this was a true account of the agreement (T 158-66, 202-03).*

In the instant case, while the jury knew Adderly had been offered leniency for his testimony, the repeated silence from the Court and prosecutor precluded the jurors from knowing the full extent of that agreement to testify, and created the impression that Adderly would receive leniency no matter whom he named as the third robber. The prosecutor's failure to inform the jury when Adderly lied constituted a breach of his responsibilities. Giglio v. United States, 405 U.S. 150 (1972); Napue v. Illinois, 360 U.S. 264 (1959).

Appellant's right to a fair trial encompassed the right to have the jury know that Adderly was not free to make an honest change in testimony as to the identity of the third robber without adding years of imprisonment to his sentence.** Both the Court and the prosecutor made the conditions under which Adderly would get the lesser plea perfectly clear to him,

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*The minutes of this proceeding are annexed as Appendix G.

**The jury was told (T 199-201) that under New York law the range of punishment for Adderly's pre-trial plea to robbery in the first degree, as a second offender, was 15-60 years, Former N.Y. Penal Law, §§1941, 2225. A plea to attempted robbery in the third degree would subject Adderly to only 2-1/2 to 10 years' imprisonment. Former N.Y. Penal Law, §§261, 1941, 2129. The difference in the minimum sentence is 12-1/2 years.

and Adderly knew he would not receive the lesser plea if he did not name appellant. Because of Adderly's repeated denials and the failure by either the prosecutor or the judge to reveal this critical aspect of the agreement, the jury was never informed. The jury's failure to have this information made a full and fair appraisal of Adderly's credibility impossible, and precluded the jurors from understanding why Adderly was locked into testimony incriminating appellant.

It is clear that Adderly lied about the agreement to testify in order to curry favor with the prosecutor by making his testimony as credible as possible to the jurors. Napue v. Illinois, supra, 360 U.S. at 270-71. As this Court has observed:

> An accomplice so testifying may believe that the defendant's acquittal will vitiate expected rewards that may have been either explicitly or implicitly promised him in return for his plea of guilty and his testimony.
>
> United States v. Padgett, 432 F.2d 70, 74 (2d Cir. 1970).

To withhold this knowledge from the jury deprived the jurors of important information necessary to assess Adderly's motives to lie about the identity of the third robber.

The conduct of the Court greatly exacerbated the prejudice to appellant because, when counsel sought to elicit what was virtually a quote from the Court's own statement as to the condition of Adderly's receiving the lesser plea, the Court

twice told counsel and the jury:

> Well, it is untrue if your are referring to the time he offered the plea in court. Of course it is untrue.

(T 158-59).

Moreover, the Court's unsworn testimony supporting Adderly added the judge's prestige and stamp of approval to the repeated lies of the accomplice about the terms of his agreement, as well as to Adderly's entire testimony implicating appellant as the third robber. The Court abandoned the neutral position of a trial judge and gave unsworn testimony in support of Adderly's false testimony.

As Judge Breitel viewed the question from another point of view, the Court's interference with the cross-examination of Adderly, in violation of the right of confrontation, deprived appellant of the argument that Adderly could not make an honest change of testimony as to the identity of the third robber without losing the right to enter the reduced plea. United States v. Padgett, supra, 432 F.2d at 704, 705. Without the knowledge that Adderly was not free to make an honest change in testimony, the jurors could not make a discriminating appraisal of Adderly's motivations to testify as he did. Id., at 701; United States v. Campbell, 426 F.2d 547, 550 (2d Cir. 1970).

In short, appellant was denied a trial which could in any sense be called fair. The District Attorney conceded in the New York courts that Adderly was his "primary" witness

against appellant. See Statement Pursuant to Former Code of Criminal Procedure §342-a. Given the doubtful quality of Mrs. Gardner's testimony, discussed supra, the jury's verdict of necessity rested heavily on the jurors' assessment of Adderly's veracity. Be depriving them of the knowledge of the extent of the prosecution's agreement with Adderly, the jurors remained unaware of the full extent of Adderly's interest in testifying as he did, and of the fact that Adderly's testimony as to the terms of the agreement was false. Thus, the order should be vacated and the case remanded for a new trial. United States v. Massimo, 275 F.2d 129, 132, 133 (2d Cir. 1960).

CONCLUSION

For the above-stated reasons, the order of the District Court should be vacated, the writ granted, and the case remanded for a new trial.

Respectfully submitted,

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April 8, 1974

Certificate of Service

April 8, 1974

I certify that a copy of this brief and appendix has been mailed to the Attorney General for the State of New York.

Lewis B. Oliver, Jr.